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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77- 77-602

ARCO PIPE LINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DEPARTMENT OF ENERGY, AND FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

JOHN T. UPDEGRAFF
ARCO Pipe Line Company
ARCO Building
Independence, Kansas
67031

ROBERT E. JORDAN, III
JAMES H. PIPKIN, JR.
STEVEN H. BROSE
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

Attorneys for Petitioner
ARCO Pipe Line Company

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner ARCO Pipe Line Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 29, 1977, in consolidated proceedings styled *Mobil Alaska Pipeline Company* v. *United States of America and Interstate Commerce Commission*, Nos. 77-2392, 77-2412, 77-2421 and 77-2437, 557 F.2d 775 (5th Cir. 1977). Petitions for certiorari with respect to that judgment have heretofore been filed with this Court in *Mobil Alaska Pipeline Co.* v. *United States*, No. 77-452; *Exxon Pipeline Co.* v. *United States*, No. 77-457; and *BP Pipelines Inc.* v. *United States*, No. 77-551.

OPINIONS BELOW

On July 29, 1977, the United States Court of Appeals for the Fifth Circuit, by a divided panel, denied various requests for interlocutory relief, and dismissed four petitions for review of an order of the Interstate Commerce Commission entered in Investigation and Suspension Docket No. 9164, *Trans Alaska Pipeline System (Rate Filings)*. The opinion of the Fifth Circuit, and the separate dissenting opinion of Judge Roney, are set forth at Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2350(a). This petition is filed within ninety days of July 29, 1977, the date on which the judgment of the Court of Appeals was entered.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may avoid the plain statutory prohibition against the prescription of rates without a full hearing, by styling such prescription as the waiver of part of its power to suspend rates.

2. Whether the rate-making framework embodied in the Interstate Commerce Act vests in the Commission the power to suspend initial rates.

3. Whether the Commission has the power to order a refund condition with respect to initial rates, in the face of the express statutory limitation of that power to "changed" rates.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions most directly involved are Sections 15(1) and 15(7) of the Interstate Commerce Act, 49 U.S.C. §§ 15(1), 15(7). Also involved is the fifth

amendment to the Constitution of the United States. These provisions are set forth in full at Appendix C.

STATEMENT OF THE CASE

Petitioner ARCO Pipe Line Company ("ARCO Pipe Line") is the owner of a 21.0 percent undivided interest in the Trans Alaska Pipeline System ("TAPS"),[1] an 800-mile crude oil pipeline extending from Prudhoe Bay on the Alaskan North Slope, to the Port of Valdez on the Gulf of Alaska. Construction of TAPS was authorized in November 1973 by the Trans-Alaska Pipeline Authorization Act.[2] Construction commenced in early 1974 and was completed in June 1977 at a total cost of approximately $8 billion.

On May 31, 1977, ARCO Pipe Line filed with the Interstate Commerce Commission ("ICC" or "Commission") its initial tariff for crude oil transportation between Prudhoe Bay and Valdez, to become effective on June 30, 1977.[3] The tariff stated a rate of $6.04 per

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[1] The other owners of undivided interests in TAPS are Amerada Hess Pipeline Corp. (1.5 percent), BP Pipelines Inc. (15.84 percent), Exxon Pipeline Co. (20.0 percent), Mobil Alaska Pipeline Co. (5.0 percent), Phillips Alaska Pipeline Co. (1.66 percent), Sohio Pipe Line Co. (33.34 percent), and Union Alaska Pipeline Co. (1.66 percent). In an undivided interest, as opposed to a stock-type, pipeline, each interest owner constitutes a separate carrier, each having an individual tariff and each being in competition with the others for traffic and customers.

[2] 43 U.S.C. § 1651, Pub. L. 93-153, 87 Stat. 584.

[3] Under the Interstate Commerce Act ("Act"), 49 U.S.C. § 1 et seq., any "common carrier engaged in . . . the transportation of oil . . . by pipeline" is subject to regulation by the ICC. Section 6(1) of the Act, 49 U.S.C. § 6(1), requires each such carrier to publish tariffs "showing all the rates, fares, and charges for transportation between different points on its own route. . . ." The ICC's jurisdiction over common carrier oil pipelines has since been transferred to the Department of Energy and the Federal Energy Regulatory Commission pursuant to Sections 306 and 402(b) of the Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565, 42 U.S.C. §§ 7155, 7172(a).

barrel. Each of the other TAPS owner companies likewise filed individual tariffs, stating rates ranging from $6.09 to $6.44 per barrel. On June 15, 1977, protests challenging the initial tariffs were submitted by the State of Alaska, the Bureau of Investigations and Enforcement of the ICC, the Antitrust Division of the United States Department of Justice, and the Arctic Slope Regional Corporation (an organization of native Alaskans). Each of the protests sought suspension of the tariffs and the imposition of varying levels of interim rates. Pursuant to a schedule established by the Commission, replies to the protests were filed on June 22 and a non-evidentiary hearing, consisting solely of oral argument, was held by the Commission on June 27.[4]

On June 28, 1977, the Commission rendered its decision. *First*, it concluded "that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates," and directed the commencement of such an investigation. *Second*, it ordered the proposed initial rates suspended pending the outcome of the investigation, for a period not to exceed the statutory suspension limit of seven months. *Third*, the Commission prescribed interim rates to be effective during the suspension period, and authorized the TAPS carriers to file tariffs reflecting such rates on one day's notice. The rates prescribed by the Commission ranged from $4.68 to $5.10 per barrel, with ARCO Pipe Line authorized to file at a rate of $4.91 per barrel. The interim rate prescribed for ARCO Pipe Line was thus 18.7 percent below that contained in its initial tariff. *Finally*, the Commission ordered that as a condition to filing interim rates, the carriers keep account of all amounts collected and agree to refund any portion of such amounts ultimately held to be excessive.

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[4] Evidentiary hearings are foreclosed by the ICC's rules governing tariff suspensions.

Several carriers, including ARCO Pipe Line, thereafter filed with the Fifth Circuit petitions for review of the Commission's decision. ARCO Pipe Line's petition, filed on July 13, 1977, and its request for an interlocutory injunction, filed on July 14, 1977, challenged the decision principally on the grounds that both the Interstate Commerce Act and the Due Process Clause prohibit the Commission, prior to a full investigation and hearing, from prescribing rates; that in any event, the Act does not permit the Commission to suspend initial, as opposed to "changed," rates; and that the rates prescribed by the Commission were confiscatory. ARCO Pipe Line also contended that the ICC's purported requirement that the carriers transport oil at the prescribed rates [5] would impose irreparable harm upon it, because it would be unable as a matter of law to recover any revenues lost if the interim rates were held to be unreasonably low. ARCO Pipe Line noted, however, that no harm would result to any of the protestants or to the public interest if the initial rates were permitted to go into effect, because under the statutory scheme ARCO Pipe Line would be subject to a liability for "reparations" to the extent its rates were found unreasonably high.[6]

In expedited proceedings, the Fifth Circuit, on July 19, 1977, heard oral argument on the petitions for review and on the motion of the United States to dismiss the

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[5] The Commission, of course, left the carriers with the option of not filing interim rates, thereby precluding the shipment of Prudhoe Bay oil pending the outcome of the tariff suspension proceeding.

[6] ARCO Pipe Line further pointed out that the interests of consumers are not affected by the tariff level. The price of crude oil delivered to the lower 48 states is fixed by the level of world prices, and is not affected by transportation costs. Such transportation costs do directly affect the wellhead value of the oil at the North Slope of Alaska. The State of Alaska has a one-eighth royalty share of the oil produced and a severance tax based upon wellhead value. Hence, the State is motivated to minimize the pipeline tariff in order to increase the wellhead value.

petitions. On July 29, in a 2-1 decision (Judge Roney dissenting), the court granted the motion to dismiss. The majority held that while the statute permits the ICC to prescribe rates only after a full hearing, the Commission may nonetheless lawfully establish rates as an incident to its suspension power. The court similarly upheld the imposition of a refund obligation as a proper incident to the suspension power, despite the fact that the statutory provision authorizing refunds does not extend to initial rates.

Judge Roney, dissenting, defined the Commission's order as rate-making. Judge Roney premised his dissent upon the rule that the Commission may prescribe rates only upon a finding that the proposed rates are unreasonable, and then only after a full evidentiary hearing. He noted the inequity of depriving the carriers of recoupment if the prescribed rates are found to be too low, while requiring them to make refunds if the rates are unlawfully high, and concluded that the case should have been remanded to the Commission for further consideration.[7]

REASONS FOR GRANTING THE WRIT

As noted by Judge Roney, the Commission's action challenged herein presents "a situation never previously confronted by the courts." App. at 18a, 557 F.2d at 802. Suspension of the TAPS tariffs permitted the Commission to put the carriers to the unprecedented choice between refiling at prescribed "interim" rates averaging nearly 20 percent below those which had originally been submitted, or not transporting any North Slope oil at all and suffering massive losses on an $8 billion investment.

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[7] On September 8, 1977, the Fifth Circuit denied the motion for rehearing, and the suggestion for rehearing en banc, filed by BP Pipelines Inc. On that same day, the Court denied Union Alaska Pipeline Company's petition for review which had been transferred to the Fifth Circuit after the Court's consideration of the earlier-filed petitions for review.

The Commission's Order was premised on two erroneous assumptions: (1) that the Commission has the power to suspend an initial, as opposed to a changed, rate, and (2) that the Commission can, prior to a full hearing, effectively prescribe a rate by requiring ARCO Pipe Line to elect between not operating at all[8] and "voluntarily" refiling at a lower rate named by the Commission. Both assumptions are invalid. The Fifth Circuit attempted to overcome these deficiencies by ignoring the provisions of the Interstate Commerce Act, and, in effect, invoking a rate-making scheme of its own invention. The resulting suspension of the TAPS carriers' lawful initial tariffs, and coercive prescription of interim rates, does violence to ARCO Pipe Line's statutory and constitutional rights.

I. THE COMMISSION DOES NOT HAVE AUTHORITY TO PRESCRIBE A RATE WITHOUT A FULL HEARING

Central to the statutory rate-making scheme is the proposition that rates are to be fixed by the carrier in the first instance. *See, e.g., Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932); *Hanna Mining Co.* v. *Missouri Pac. R.R.*, 332 I.C.C. 166, 171 (1968). Under Section 15(1) of the Act, 49 U.S.C. §15(1), the Commission is not itself empowered to prescribe rates, except on review of those established by the carrier, and then only after "full hearing" and a finding that the rate fixed by the carrier "is or will be unjust or unreasonable . . . or otherwise in violation of [the Act]."

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[8] Under the Act, a carrier is not permitted to transport oil by pipeline in interstate commerce unless it has on file an effective tariff. 49 U.S.C. § 6(7). Accordingly, the suspension of an initial tariff renders the carrier unable to transport over the subject route during the period of suspension. This is to be contrasted with the suspension of a *changed* tariff, the effect of which is to require the carrier to revert to the terms of the tariff theretofore in effect.

The logic of the Fifth Circuit's opinion is that the suggestion of an interim rate does not amount to an unlawful prescription but rather is a lawful incident to the power to suspend. There is a total absence of support for that theory in the Interstate Commerce Act, and in the circumstances of this case the Fifth Circuit's approach has plainly undermined the statutory rate-making process.

Under Section 15(1) the Commission cannot prescribe rates (whether denominated "interim" or not) on a summary examination of tariffs, or on a mere suspicion that they are too high; to the contrary, it must afford a full hearing to consider the lawfulness of the proposed rates.[9] This Court has made clear that this is not a technical requirement, but a mandate that a truly "ample opportunity [be] afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety from the standpoint of justice and law, of the step asked to be taken." *Akron, C. & Y. Ry.* v. *United States (The New England Divisions Case)*, 261 U.S. 184, 200 (1923).

The history of this case lays bare the Commission's plain failure to comply with that mandate. The skeletal, conclusory submissions which the Commission had before it at the time of its decision can hardly be said to constitute the full record that the statute requires before a rate can be prescribed. Indeed, the Commission was at an even greater disadvantage here than in the ordinary case. The initial tariffs at issue before the Commission concerned a new pipeline, transporting goods over a route previously not available to shippers, and presenting unprecedented cost and regulatory factors. Thus there was no useful closely comparable experience upon which the

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[9] At that required hearing, the burden is squarely on the protestants to prove the unlawfulness of the initial rate. 49 U.S.C. § 15(7).

Commission might have drawn to arrive at a range of presumptively lawful rates.

To avoid the implications of these circumstances, the Fifth Circuit majority was forced to create a legal fiction, and to theorize that the Commission had not in fact prescribed rates, but rather had "partially waive[d] the suspension power" by announcing "that if [the carriers] would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally fild." App. at 13a, 557 F.2d at 782. That view was principally grounded on a patent misreading of this Court's decision in *United States* v. *Chesapeake & O. R.R.*, 426 U.S. 500 (1976) (*"C&O"*).

C&O involved the lawfulness of a Commission order conditioning a decision not to suspend increased rates on the requirement that the carriers devote the revenues added by the increases to the purposes which had been proffered in support of those increases. This Court approved that condition as within the Commission's suspension authority:

> The railroads had made the representation that the increase was justified, at least in part, by the need to take care of deferred maintenance and deferred capital expenditures. If the railroad did, in fact, use the increased revenues for such purposes, the Commission perceived no reason to impose a suspension of the tariff or to undertake a lengthy investigation and, consequently, no reason to frustrate the clear congressional intent that "just and reasonable rates" be implemented. [426 U.S. at 514.]

In short, the Commission and the Court "simply held the railroads to their representation that the increase was justified by needs in these two areas." 426 U.S. at 515. No tampering with the carrier-set rate was suggested; the alternatives available to the Commission with respect to the rate remained either acceptance or suspen-

sion. It is a large, and we submit unwarranted, leap from the narrowly constrained logic of *C&O* to this case, in which the conditions imposed go to the level of the rate itself. In the present case, the "condition" constitutes a blatant avoidance of the statutory requirement of a full hearing as a prerequisite to the prescription of rates. *C&O* offers no support for that approach.

To the contrary, the decisions of this and other courts strictly and properly hold the Commission to the limited rate-making power granted it by the Interstate Commerce Act.[10] In *Atchison, T. & S.F. Ry.* v. *United States*, 284 U.S. 248, 262 (1932), for example, this Court noted that the ICC, "exercising a delegated regulatory authority . . ., operates in a field limited by constitutional rights and legislative requirements. . . . In the discharge of its duty [under Section 15(1)], a fair hearing is a fundamental requirement." This requirement had been earlier detailed in *ICC* v. *Louisville & N. R.R.*, 227 U.S. 88 (1913), where the Court found that Section 15(1) guarantees a full hearing, which must include the right to "be fully apprised of the evidence submitted or to be considered, . . . to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal." 227 U.S. at 93.

Attempts to circumvent these requirements through self-serving agency rationalizations have been flatly rejected. Most prominent in this regard is *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970). There, the major domestic

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[10] In *ICC* v. *Cincinnati, N.O. & T.P. Ry.*, 167 U.S. 479, 494 (1897), a case that arose prior to the passage of the Hepburn Act (which amended the Interstate Commerce Act to add the prescription power now contained in Section 15(1)), this Court rejected the contention that the Commission's authority to award reparations for past overcharges included a power to prescribe rates for the future. In so doing, it noted that the power to set rates "is so vast and comprehensive, so largely affecting the rights of carrier and shipper" that it "is never to be implied."

air carriers filed with the Civil Aeronautics Board tariffs that provided for rate increases. After oral argument scheduled on its own motion, the Board found that the tariffs "may be" unlawful and ordered the tariffs suspended and investigated. It further found, however, that the carriers had demonstrated a need for some additional revenue. It therefore "outlined its own fare formula and announced its decision to 'permit tariff filings implementing' that formula to be filed without suspension . . . ." 430 F.2d at 894-95. The Board stated that it "would 'be disposed to grant an increase'" which adhered to its plan, *id.* at 896, but warned that rates above the prescribed maximum "would be viewed *prima facie* as outside the realm of justness and reasonableness and would ordinarily be suspended and ordered investigated." *Id.* at 897. The carriers thereafter withdrew their tariffs and substituted new tariffs in accordance with the Board's plan.

On review of the Board's order, the Court of Appeals reversed. It flatly rejected the Board's contention that, because the carriers were not legally bound to refile in compliance with the formula set out in the Board's order, there had been no prescription of rates. The court characterized this as a "legalistic reading of the statute," *id.* at 895, concluding that "these rates . . . have been determined by the Board . . . ." *Id.* at 896. The Court observed:

> It would be blinking reality to hold, as the Board argues, that the order of September 12 did no more than suspend and initiate an investigation of the rates proposed by the carriers. . . . The Board did all that it could, short of formally styling its order as rate-making, to induce the carriers to adopt the proposed rates. [430 F.2d at 897-98.]

The Commission's Order and the Fifth Circuit's opinion reflect an approach parallel to that rejected in *Moss*.[11] As in *Moss*, 430 F.2d at 896-98, "[i]t would be blinking reality" to conclude that authorizing leave to refile at the specified interim rate constitutes anything less than the *de facto* prescription of rates by the Commission without a full and fair hearing.[12] Judge Roney correctly concluded in his dissent below that "[t]his is ratemaking. We should not hide from that fact." App. at 17a, 557 F.2d at 802.

Here, the imposition of a "suggested" rate produces precisely the sort of coercion, with all of the attendant risks, that concerned the *Moss* court.[13] Even more so than

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[11] ARCO Pipe Line recognizes the factual distinctions drawn by the Fifth Circuit and the Commission between the present case and *Moss*. There is no question that certain aspects of *Moss* are not directly transferable to the instant situation. The critical importance of *Moss*, however, lies not in its status as controlling precedent, but in its enunciation of certain fundamental principles that bear generally on the matter of improper agency action. *Moss*, in short, did not alter the law, but rather articulated the practical standards against which the real impact of agency actions are to be judged.

[12] To the extent that evidence beyond the order itself is necessary in support of this proposition, the Commission itself supplied it at the final closed meeting prior to issuance of its suspension order. The transcript of that meeting was furnished by the Commission in response to a Freedom of Information Act request, and is reproduced in relevant part at Appendix B. Included therein is a discussion which discloses that the initial draft decision had spoken of the "specifying" of rates. That was changed to "authorizing" in the final draft because, as stated by one staff member, "[w]e felt that was more consistent with a lack of prescription." App. at 29a. That same staff member also advised the Commission that while it might be acceptable to use "specify" in the text of the order, it would be better not to use it in a heading. App. at 31a. These passages plainly reflect that the Commission perceived no substantive difference between authorizing and prescribing rates, and was drawing the distinction solely in the hope of avoiding the *Moss* rule and the plain requirements of the Interstate Commerce Act.

[13] Subsequent cases have read *Moss* as permitting judicial statutory scrutiny of "'sham' suspensions aimed at coercing behavior

in *Moss*, the Commission here was acting with a nearly total absence of relevant facts. In addition, the matters that a full investigation and hearing would necessarily inquire into are unusually complex, difficult and novel, and the Commission lacked the pool of applicable acquired experience which it has in most matters before it and which the CAB had in *Moss*. Thus, on the present state of the record, the "suggestion" of rates by the Commission was without basis, and completely subverted the statutory scheme.

This prescription of rates, backed by a suspension of the initial tariffs, placed ARCO Pipe Line in a grossly unfair position. Its only alternatives were to hold to the initial tariff, and thereby face a seven-month suspension during which it could carry no Alaskan oil and would suffer massive financial losses, or to accede to and adopt the Commission's "suggested" rate. The economic coercion is apparent. *Cf. Consolidated Edison Co.* v. *FPC*, 512 F.2d 1332, 1340-41 (D.C. Cir. 1975). Under the Commission's approach, ARCO Pipe Line's discretion to set rates, as guaranteed by the Act, has been "so circumscribed as to [be] almost nonexistent." *National Association of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 567 (2d Cir. 1972).

Simply stated, the Commission has forced the TAPS owners to choose between (1) allowing an $8 billion investment to remain idle, thereby delaying the arrival of North Slope oil and the accompanying balance of payments benefits, or (2) bowing to economic coercion and agreeing to refile at the lower rates. The "authorization

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rather than merely preserving the status quo pending investigation." Continental Airlines v. CAB, 522 F.2d 107, 129 (D.C. Cir. 1975). In SCRAP v. United States, 346 F. Supp. 189 (D.D.C. 1972) (three-judge court), *rev'd on other grounds*, 412 U.S. 669 (1973), the court stated that "[a] suspension decision which effectively blackmails the carriers into submitting agency-authored rates is functionally indistinguishable from an agency order setting those rates. . . ." 346 F. Supp. at 197.

to refile" is thus tantamount to the Commission's prescription of a rate without a proper, full hearing, a result which Section 15(1) and the *Moss* case clearly forbid.

II. THE COMMISSION DOES NOT HAVE AUTHORITY TO SUSPEND AN INITIAL RATE

Underlying the Fifth Circuit's approach to the prescription by the Commission of interim rates was the view that the Commission had the threshold authority to suspend initial, as opposed to changed, rates. The Court of Appeals stated that the language of the Act "has no plain meaning" and that the "statutory history . . . yields little insight," App. at 11a, 557 F.2d at 781, but concluded that "it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme." App. at 12a, 557 F.2d at 782. To the contrary, the relevant statutory language, its legislative history, and the statute's overall rate-making framework all suggest that Congress intentionally limited the suspension power to changed rates.

Section 15(7) of the Act, 49 U.S.C. § 15(7), provides, in part:

> Whenever there shall be filed with the Commission any schedule stating a *new individual or joint rate*, the Commission shall have . . . authority . . . to enter upon a hearing concerning the lawfulness of such rate, . . . and pending such hearing and the decision thereon, the Commission . . . may . . . *suspend the operation of such schedule and defer the use of such rate*, . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect. . . . [Emphasis added.]

While the Commission found comfort in the use of the word "new," a reading of Section 15(7) in its entirety indicates an interchangeability between that word and the term "changed rate," which also appears in the sec-

tion. See App. at 38a-40a.[14] The Commission recognized this principle early in the Act's existence, when it held that "[b]y [Section 15(7)] we are given authority to determine the 'lawfulness' of a 'new' rate, *whether it be increased or decreased.*" *Salt From Louisiana Mines to Chicago, Ill., St. Louis, Mo., and Intermediate Main Line Points*, 69 I.C.C. 312, 313 (1922) (emphasis added).

In addition to the language of Section 15(7), the legislative history of that provision is wholly consistent with the view that Congress was limiting the suspension power to changed rates. The genesis of the suspension provision was the Commission's frequently expressed view that, in order adequately to prevent railroad abuse of shippers, it required authority to restrain "advances," or increases, in rates. The most effective grant of authority, the Commission suggested, would be the power to maintain the "status quo while proceedings are pending to test the reasonableness of the *advance.*"[15] Congress responded by passage of the Mann-Elkins Act,[16] which added Section

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[14] Even more telling is the untenable result that would occur under the Commission's interpretation of the term "new" rate. The second sentence of Section 15(7) provides that if, during the seven-month suspension period, "the proceeding has not been concluded and an order made . . ., *the proposed change of rate* . . . shall go into effect at the end of such period." (Emphasis added.) The statute makes no similar provision for anything other than a "changed" rate. Under settled Commission law, a "changed" rate is one that modifies an existing rate of the same nature. *See, e.g.*, Animal Food, Middlewest to California, Idaho, and Utah, 332 I.C.C. 87, 88 (1967). The term "change" of rate thus excludes an "initial" rate. As a result, either the term "new" rate must be read as synonymous with a "changed" rate (*i.e.*, not an "initial" rate) or the Commission would be faced with an anomalous situation where the suspension power would be applicable to an "initial" rate but the seven-month limitation would not.

[15] *See, e.g.*, TWENTY-FIRST ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION 9-10 (1907) (emphasis added).

[16] 36 Stat. 539 (1910).

15(7) to the Act.[17] The resulting use of the terms "new" and "changed" rates cannot be viewed as insignificant.

While the Commission on occasion has nevertheless asserted the authority to suspend initial tariffs, the circumstances of those cases themselves illustrate that the suspension power does not extend to initial tariffs of the type now before the Commission. Unlike the present case, none of those cases resulted in an order that would have had the effect of entirely precluding the transportation of the goods.[18] Rather, all of those cases involved initial tariffs that were simply designed to add some new service to the carrier's existing business on the same general route, and indeed, in some of the cases the particular respondent was able to move the goods in an alternative manner.[19]

The significance of these distinctions is that they emphasize the fact implicitly recognized by both the Commission and the Fifth Circuit—that suspension is a wholly inappropriate remedy in response to an initial tariff of this sort, where the effect would be to restrain entirely the interstate movement of any North Slope oil, either by ARCO Pipe Line or any other carrier. None of the protestants at the Commission level seriously argued that the various initial tariffs should be made subject to an outright seven-month suspension during which no rates would be in effect and no interstate transportation of the petroleum would be possible. Rather, they all proposed, and the Commission utilized, suspension solely as a device

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[17] *See generally*, 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 201-02 (1931); Arrow Transportation Co. v. Southern Ry., 372 U.S. 658, 662-66 (1963).

[18] *E.g.*, Foodstuffs and Agr. Commodities, Cal., and Ariz., to W. & S., 329 I.C.C. 321 (1966); Animal Feed From Miss. and Tenn. to Midwest and S.W., 316 I.C.C. 94 (1962).

[19] *E.g.*, Animal Food, Middlewest to Calif., Idaho, and Utah, 332 I.C.C. 87 (1967); Cotton from New Orleans, 49 I.C.C. 751 (1918).

to impose unlawful interim tariffs. The Commission lacks authority to adopt that approach. The Act requires it to allow the tariffs to go into effect pending an investigation into the lawfulness of the rates.

III. THE COMMISSION DOES NOT HAVE AUTHORITY TO IMPOSE A REFUND OBLIGATION AS A CONDITION TO AN INITIAL TARIFF

Apart from the circumvention of the statutory provision regarding prescription of rates, the Commission, and in turn the Fifth Circuit, found within the powers ancillary to the suspension authority the ability to impose a refund obligation in an initial tariff. In so doing, the unequivocal language of the Act has been wholly ignored. In addition, the Commission has thereby run afoul of the principle frequently expressed by this Court that a government agency cannot achieve indirectly what it is prohibited from doing directly.

The Commission's suspension order states that:

> as a condition to filing . . . interim rates, we will require that the carriers keep account of the amounts collected under the interim rates or the proposed rates should they become effective and that they agree to refund any portion of such amounts that may ultimately be established as excessive.

This provision is in direct, indisputable conflict with Section 15(7), which by its terms expressly limits the authority to order refunds to a "proposed *increased* rate or charge." App. at 39a (emphasis added).

In the face of that statutory limitation, the Commission itself expressed serious doubts as to its power to order refunds as a condition to the filing of initial rates. At the final closed meeting of the Commission prior to issuance

of its suspension order,[20] the Commission's General Counsel referred to the authority to impose a refund provision with respect to initial tariffs as "doubtful," but concluded that "insofar as the refund provision is made a condition of the willingness of the Commission to accept a lower filed rate in the interim, that may get us over that hurdle." App. at 34a. Another staff member referred to the refund provision as a "sort of quid pro quo for allowing [the carriers] to have these interim rates." That same staff member then advised the Commission that "[t]he problem with the refund provision is our statutory authority is somewhat questionable . . . . [T]he statute refers to refunds in the case of increased rates. Here you have initial rates, but if we do it as part of allowing interim rates instead of a suspension, I think we're within reasonable limits." App. at 35a.

The Commission, in short, was consciously sidestepping the plain language of the Act when it included the refund condition. As in its use of the term "authorized," *supra* at note 12, the Commission, by a careful choice of words, sought to achieve a result unmistakably prohibited by the statute. The regulatory framework as devised by Congress cannot be permitted to be evaded in this manner, where the effect is to infringe so directly petitioner's rights.

The Fifth Circuit similarly expressed doubts as to its "power to require the carriers to establish refund provisions with respect to the originally filed rates." App. at 16a, 557 F.2d at 783. It too overcame those doubts, however, through the use of a long-discredited syllogism which reasons that "if the legislature may withhold a particular

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[20] See note 12, *supra*. It should be noted with respect to both this and note 12 that the transcript of this meeting became available only after the Fifth Circuit's decision was rendered. Thus, while the material contained in Appendix B is not of record, it is public matter, furnished by the Commission itself, and thus its authenticity is not subject to question.

benefit, it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions," Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1595 (1960). This is true, the reasoning continues, even where those restrictions could not be imposed directly. "The potential erosion of fundamental liberties through the use of this bargaining technique has prompted the development of the doctrine of 'unconstitutional conditions.'" *Id.* at 1596.

This Court articulated the concept of unconstitutional conditions in response to a number of instances of exploitation of power where the extension of governmental benefits was conditioned upon the surrender of constitutional rights.[21] The thrust of those decisions is that a "constitutional power cannot be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105, 114 (1918). As a corollary, this Court has repeatedly enunciated the rule that a government agency cannot be allowed to impose a condition which would "produce a result which [it] could not command directly." *Speiser* v. *Randall*, *supra*, 357 U.S. at 526. There is no sound reason why these principles should apply with less force to situations in which statutory, rather than constitutional, bounds have been exceeded.

In the present case, the Commission has asserted its power to suspend the carriers' initial tariffs and to authorize the filing of interim tariffs at specified lower rates

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[21] *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (conditioning entitlement to welfare benefits on citizenship or fifteen-year residency for aliens); Sherbert v. Verner, 374 U.S. 398 (1968) (conditioning unemployment compensation on agreement to accept employment in derogation of religious beliefs); Speiser v. Randall, 357 U.S. 513 (1958) (conditioning tax exemption on inhibition of freedom of speech).

in their stead. By conditioning the non-suspension of either of such tariffs upon the inclusion of an unlawful refund provision, the Commission has interfered with the carriers' statutory rights in much the same way that the conditioning of governmental benefits was found to interfere with individuals' constitutional rights. This Court should recognize the dangerous consequences which the sanctioning of this approach could readily produce. The Commission must be held to the terms of its statute and must be required to permit the filing of initial tariffs without imposition of an unlawful refund provision.

CONCLUSION

For the foregoing reasons, petitioner ARCO Pipe Line Company respectfully prays that this Court grant this petition for a writ of certiorari to review on the merits the issues raised.

Respectfully submitted,

Of Counsel:

JOHN T. UPDEGRAFF
ARCO Pipe Line Company
ARCO Building
Independence, Kansas
67301

ROBERT E. JORDAN, III
JAMES H. PIPKIN, JR.
STEVEN H. BROSE
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

Attorneys for Petitioner
ARCO Pipe Line Company

October 25, 1977

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 1977, a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served by hand upon all counsel of record below and upon the Solicitor General of the United States.

/s/ Robert E. Jordan, III
ROBERT E. JORDAN, III
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for Petitioner
ARCO Pipe Line Company

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-2392

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents,

and

SOHIO PIPE LINE COMPANY, AMERADA HESS PIPELINE CORPORATION, UNION ALASKA PIPELINE COMPANY,
Intervening Petitioners,

STATE OF ALASKA, ARCTIC SLOPE REGIONAL CORPORATION,
Intervening Respondents.

No. 77-2412

BP PIPELINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 77-2421

EXXON PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
Respondents,

and

UNION ALASKA PIPELINE COMPANY,
Intervening Petitioner.

No. 77-2437

ARCO PIPE LINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents,

STATE OF ALASKA,
Intervening Respondent.

ON PETITIONS TO REVIEW AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

July 29, 1977

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

Four petitions seeking injunctive relief and review of a June 28, 1977 Order of the Interstate Commerce Commission are before us, together with the United States' motion to dismiss.[1] For reasons discussed below, we grant the government's motion.

Background Of The Case

This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS)[2]

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[1] No. 77-2392, Petition of Mobil Alaska Pipeline Company (Mobil) to Annul, Set Aside and Enjoin Enforcement of an Order of the Interstate Commerce Commission and Applications and Motions for Temporary Restraining Order and Interlocutory Injunction. The respondents in this case were the United States, the Interstate Commerce Commission (ICC or Commission) and the latter's individual Commissioners. The State of Alaska moved to appear as a party. The Arctic Slope Regional Corporation moved to intervene. Both opposed Mobil's petition. Sohio Pipe Line Company moved to appear as a party in support of Mobil's petition, as did Amerada Hess Pipeline Corporation. Union Alaska Pipeline Company moved to appear as a party.

No. 77-2412, Petition to Enjoin, Set Aside, Suspend and Review Order of the Interstate Commerce Commission and Motion to Stay, Restrain and Suspend Order of the Interstate Commerce Commission filed by BP Pipelines, Inc. (BP), naming the United States and the ICC as respondents.

No. 77-2437, Petition for Review and Application for Interlocutory Injunction filed by Arco Pipe Line Company (Arco). The United States, the ICC and its individual Commissioners were named as respondents. Alaska also sought leave to appear as a party in opposition to Arco's petition.

No. 77-2421, Petition for Review and Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, filed by Exxon Pipeline Company (Exxon), naming the ICC and the United States as respondents. Union Alaska Pipeline Company moved to appear as a party.

The United States moved for consolidation and to dismiss. The motion for consolidation was granted from the Bench during oral argument on July 19, 1977. The court hereby grants all motions to intervene.

[2] In 1968 massive reservoirs of oil were discovered at Prudhoe Bay. Plans to construct the pipeline were announced in 1970. From

which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[3]

Between May 27, 1977 and June 15, 1977, seven TAPS owners filed the tariffs[4] which are at issue here,[5] having effective dates ranging from June 20 to July 1, 1977. Protests were filed by the Department of Justice, the

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its beginning the pipeline has been grist for judicial mills. *See, e.g., Wilderness Society* v. *Morton*, 479 F.2d 842 (C.A.D.C., 1975) (en banc); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *rev'g* 495 F.2d 1026 (C.A.D.C., 1974). Indeed, it literally took an act of Congress to prevent further environmental litigation. Trans-Alaska Pipeline Act, 43 U.S.C.A. § 1652(d). Construction was thus delayed until 1974 and took three years.

Oil began to enter the pipeline on June 20, 1977. An explosion and fire at pump station No. 8 on July 8, 1977, resulted in a temporary shutdown. The parties have informed the court that the first oil is expected to reach Valdez around July 26, 1977.

[3] Each of the following companies owns an undivided interest in TAPS:

Company	*Percentage Ownership*
Mobil Alaska Pipeline Co.	5.00%
Sohio Pipe Line Co.	33.34%
ARCO Pipe Line Co.	21.00%
Exxon Pipeline Co.	20.00%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

These companies are subject to ICC regulation by virtue of the Interstate Commerce Act, 49 U.S.C.A. § 1(1)(b), which covers common carriers engaged in the transportation of oil by pipeline.

[4] Tariffs must be filed with the ICC pursuant to 49 U.S.C.A. § 6(1).

[5] Because Phillips, the eighth owner, filed its tariff on June 20, 1977 with an effective date of July 20, the time for filing protests had not expired by June 28, the date of the ICC's order. Phillips' tariff was thus not covered by the Order and is not before this Court.

State of Alaska,[6] the Arctic Slope Regional Corporation,[7] and the ICC's Bureau of Investigation and Enforcement. The Commission heard oral argument on June 27, 1977.[8]

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[6] Alaska owns a one-eighth royalty interest in the oil from the Prudhoe Bay fields. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, *i.e.*, the wellhead value. Alaska contends that the wellhead value is generally determined by the market price *less* the transportation costs. Therefore, as the TAPS carrier rates increase, the value of Alaska's interest decreases.

[7] Prior to the enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. §§ 1601-1627, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. The Arctic Slope Regional Corporation is one of 12 corporations established pursuant to ANCSA to conduct Native Alaskan business for profit. 43 U.S.C.A. § 1606. As compensation for the extinguishment of all aboriginal land claims, ANCSA granted Alaskan Natives fee title to approximately 400 million acres of land. 43 U.S.C.A. §§ 1611, 1613. All future revenues derived from that land will be the property of the Native people. 43 U.S.C.A. § 1606. ANCSA further provided for cash compensation of $962,500,000, to be paid over a period of years, a portion of which is to be derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C.A. §§ 1605, 1608. Thus, on their theory, the Native Alaskans' revenue is inversely related to the rise in TAPS tariffs.

[8] Recognizing the importance of the controversy, the ICC, in an extraordinary move, bypassed its usual procedural channels and took the suspension proceeding for its own direct consideration. While Commission regulations consider a protest and petition to suspend "as addressed to the discretion of the Commission," 49 C.F.R. § 1100.42 (1976), suspension protests and petitions are in practice routinely referred to the Board of Suspension. See 49 C.F.R. § 1100.200 (1976); Mobil Memorandum In Support of Application for Interlocutory and Temporary Restraining Order at 7; Reply of Interstate Commerce Commission in Opposition To Application For Interlocutory Injunction and Temporary Restraining Order at 4. The Commission heard arguments for one full day before issuing its suspension order.

Although a transcript of that hearing was made, the papers on file with the Court contain only excerpts from that proceeding. *E.g.*,

without making any formal evidentiary record.[8a]

Appendix A to Justice Department's Memorandum in Support of Motion to Dismiss; Appendix C to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order. Also, the tariff filings themselves, with any supporting submissions, were not filed with the Court. On file with the Court, however, were several exhibits such as "Reply of Exxon Pipeline Company to Protests" (Appendices of Exxon Pipeline Company for Expedited Consideration or in the Alternative Stay Pending Review) and statements by C. R. Thompson, Controller-Treasurer of Mobil Alaska Pipeline Co. (Appendix D to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order).

[8a] The briefs of the parties contained references to the information which the ICC apparently had before it during the suspension proceeding. Such information included: (i) written representations in the form of protests from the State of Alaska, the Arctic Slope Regional Corporation, the United States Department of Justice, and the Bureau of Investigations and Enforcement of the ICC (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 2); (ii) verified statements offered by the TAPS Carriers in support of their rate calculations (Memorandum in Support of Exxon Pipeline Company's Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review at 46) [hereinafter Exxon Memorandum]; (iii) statement of Dr. Michael J. Ileo (submitted with Alaska's protest) which discusses the unreasonableness of carriers' rate calculations (Exxon Memorandum at 46); (iv) sworn testimony of Raymond B. Gary, a Managing Director of Morgan Stanley & Company, and Dr. Ezra Solomon, Dean Witter, Professor of Finance at the Graduate School of Business of Stanford University, filed in Ex Parte No. 308, *Valuation of Common Carrier Pipelines* (Exxon Memorandum at 38); (v) letters sent from Mobil Alaska Company to ICC (obtained under the Freedom of Information Act, 5 U.S.C.A. § 552) which deal with such topics as TAPS start-up, depreciation, dismantling and restoration, anticipated salvage, and estimated annual operating expenses (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 25-6); (vi) calculation of the rates of return on valuation for 90 regulated pipelines for the years 1970-72, made by George M. Stafford, former ICC Chairman (Exxon Memorandum at 40-1); and (vii) a variety of carrier-provided data concerning the normal traffic volume for the beginning years of TAPS, costs, depreciation charges, and investment calculations (ICC June 28 Order at 5-7 and Appendices to Order).

The ICC's June 28 Order[9] instituted an investigation into the lawfulness of the tariffs pursuant to 49 U.S.C.A. §§ 15(1)[10] and 15(7).[11] The rates filed were suspended

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[9] The Order is set forth as an Appendix to this opinion.

[10] 15 U.S.C.A. § 15(1) reads in pertinent part as follows:

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title . . . is or will be unjust or unreasonable . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum to be charged . . . and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be . . . ."

[11] 15 U.S.C.A. § 15(7):

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of

for seven months without prejudice to the filing of interim rates during the suspension period. The Commission additionally authorized the filing, upon not less than one day's notice, of interim rates which were not to exceed certain levels, subject, however, to the condition that the carriers keep account and that (i) the interim tariffs contain a refund provision to the effect that if the new rates exceed those subsequently authorized or prescribed by the ICC, the carriers will refund the excess with interest; and (ii) the carriers file a similar refund provision applicable to the original proposed rates. The Order thus had the following effect on the carriers' proposed rates per barrel:

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such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. . . ."

	As Filed by TAPS Owners	Authorized By Order [12]	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	Not Yet Acted Upon	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

The carriers estimate that the Order will result in an irretrievable $340 million loss over the seven-month suspension period.

The suspension left the pipeline companies without tariffs on file, and they are forbidden by § 6(7) of the Act to engage or participate in the transportation of oil unless they file new tariffs. The carriers thus had two alternatives open to them. They could file new tariffs within the ICC guidelines or they could shut down the TAPS system for the seven-month suspension period. Unhappy with either choice, the pipeline companies filed their petitions and motions and the United States moved to dismiss.[13] This Court heard oral argument on July 19, 1977.

The major issues raised by the parties are (i) whether we have jurisdiction to review the ICC order; (ii) whether the Commission has the authority under 49 U.S.C.A. § 15(7) to suspend the first and only ("initial") rate of a carrier; (iii) whether as part of a purported suspension order the ICC may prescribe or suggest optional maximum interim rates; (iv) whether the ICC's order authorizing

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[12] According to the ICC, these rates reflect a 10% rate of return on tentative valuation. See pp. 4-8 of the ICC Order, and Appendices 2-5 thereto.

[13] *See* note 1, supra.

the filing of maximum interim rates without a full hearing amounted to a prescription of rates within the meaning of 49 U.S.C.A. § 15(1); (v) whether the Commission acted outside its statutory authority in ordering the refund provisions in the tariffs; (vi) whether the Commission's action was arbitrary, capricious or constituted an abuse of discretion; (vii) whether the maximum interim rates authorized were confiscatory in violation of the Fifth Amendment.

1. Reviewability and the authority of the Commission

The government has moved to dismiss the petitions for review on the ground that this court has no jurisdiction to review suspension orders of the ICC issued pursuant to 49 U.S.C.A. § 15(7). True, courts do not have jurisdiction to review ICC suspension orders. Congress has committed the decision to suspend or not to suspend proposed rates exclusively to the discretion of the Commission. *U.S.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 10 L.Ed.2d 52 (1963); K. Davis, ADMINISTRATIVE LAW TREATISE 966 (1970 Supp.). As a panel of this circuit noted:

> The Interstate Commerce Commission . . . is vested with power to suspend, at its discretion, for a period of seven months, rates filed with it pending hearing and decision on their lawfulness. 49 U.S.C. § 15(7). The existence of this power in the ICC, it has been held, evinces the deliberate decision of Congress to extinguish judicial power to grant any injunction which interferes with the Commission's discretionary decision to suspend rates filed with it at anytime before the Commission finally determines the lawfulness of the rates.

Texas v. *Seatrain International*, 518 F.2d 175 at 178 (CA5, 1975). But the rule of unreviewability presupposes an affirmative answer to a preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7). A suit to enjoin a suspension order may be entertained if the complaint shows that the agency lacked the basic statutory authority to issue such an order. *Great Western Packers Experss, Inc.* v. *U.S.*, 246 F.Supp. 151, 154 (D.Colo., 1965) (three-judge court); *Long Island Railroad Co.* v. *U.S.*, 193 F.Supp. 795, 800 (E.D.N.Y., 1961) (three-judge court).

Section 15(7) gives the ICC the power to suspend "any schedule stating a new individual or joint rate fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate fare or charge" for a period not to exceed seven months, and to order an investigation and full hearings on those new charges. The above language has no plain meaning. The term "new" can refer to both changed and initial rates or only to changed rates. The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.

Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. § 15(7)

giving the ICC authority to suspend new rates, proposed by motor carriers, 49 U.S.C.A. § 316(g), by water carriers, 49 U.S.C.A. § 907(g)(i), and by freight forwarders, 49 U.S.C.A. § 1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. § 1482(g), which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers.

The conclusion that initial rates are covered by § 15(7) is consistent with the legislative policy underlying that section. Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

2. The suggested interim rates

The petitioners challenge the action of the Commission with respect to suggested interim rates. They point out that § 15(7) contains no provisions for establishing interim rates and that, in any event, rates can only be prescribed after full hearings. See 49 U.S.C.A. § 15(1).

The Commission's position is that it has not actually fixed a rate but, in a situation of urgent national interest and as an incident of its power to suspend, it has given advance indication of the maximum rates with respect to which—if the carriers elect to file them—the Commission will not exercise its power to suspend.

The Commission Order refers to "interim rates," but baldly describing the issue as the power of the Commission to set interim rates is misleading. As we have held, the Commission had the power to unconditionally suspend the proposed tariffs, leaving the carriers without any tariffs but free to file new tariffs if they wished, which would be subject to new exercise of the Commission's power to suspend. The ICC chose not to exercise to its full limits the drastic but available power of unconditional suspension and instead announced that if petitioners would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally filed.

The petitioners maintain that the § 15(7) power to suspend is an all or nothing instrument. We think not. The Commission may elect to exercise its power less than fully, or putting it another way, may partially waive the suspension power. We are guided by the Supreme Court's decision in *U.S.* v. *Chesapeake & Ohio Railroad Co.*, 426 U.S. 500, 49 L.Ed.2d 14 (1976) ("*Chessie*"). In *Chessie* the ICC suspended a carrier-proposed tariff increase but at the same time authorized the railroads to refile, incorporating conditions which would assure that the additional revenue would be expended on capital improvements and deferred maintenance. The Supreme Court upheld the refiling provision as directly related to the ICC's suspension power. The Court noted that the ICC could simply suspend the originally proposed rates for the full statutory seven-month period but that instead "it pursued a more measured course and offered an alternative tailored

far more precisely to the particular circumstances presented." 426 U.S. at 514, 49 L.Ed.2d at 23. *Chessie* establishes the right of the ICC to choose to exercise its suspension power to less than its outer limits, in order to meet the needs of a particular situation. The ICC's authorization to file interim rates was the type of "more measured course" or partial waiver which the Supreme Court approved in *Chessie.*

Moss v. *CAB*, 430 F.2d 891 (C.A.D.C., 1970), relied on by tre petitioners, is not to the contrary. In *Moss* the Court of Appeals for the District of Columbia held that the Civil Aeronautics Board (CAB) could not, after ex parte meetings with the air cariers, "suggest" a comprehensive rate formula that it would not suspend or investigate. *Moss* involved what for all intents and purposes was the establishment of permanent rates. By attempting to establish a permanent rate structure through its suspension power the CAB took actions which went beyond the strongest action it could have taken under its suspension power, i.e., suspending the proposed increases for 180 days. 49 U.S.C.A. § 1482(g). In essence what the CAB attempted to do in *Moss* was to waive a right it did not have. In contrast, the ICC's suggestion of interim rate ceilings in the present case is an action which is more restrained, or measured, than its right to unconditionally suspend the original tariff for a period of seven months. If in seven months the ICC has not completed its investigation, the carriers will be free to levy their originally filed charges subject to a refund order.

Also, in *Moss* the practical effect of the CAB's actions would have been to immunize the suggested permanent rate structure from judicial review.[14] In the present case

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[14] Judge Leventhal in his concurring opinion in *Continental Airlines, Inc.* v. *CAB*, 522 F.2d 107 at 131 (C.A.D.C., 1975) (en banc), emphasized the evasion of judicial review as the key to *Moss.*

the ICC has not sought to shield its final decision from judicial review. Instead the Commission has commenced hearings on the original rates proposed by the petitioners, and any eventual final order stemming from those hearings is subject to judicial scrutiny.

In a case involving initial rates, if the ICC could not couple its suspension order with a statement of maximum allowable interim ceilings, the Commission would be forced to allow initial rates to go into effect, even if facially outrageous, subject only to lengthy investigation and hearing procedures, or to watch a possibly vital public service close down for want of a rate schedule. We doubt the Congress would have intended that the Commission face that Hobson's choice.

The use of interim rates as a condition to a suspension order is not unprecedented. In I & S Docket No. 8645, Orders (May 27, 1971, and June 29, 1971) the Commission ordered that increased lighterage charges proposed by the Penn Central Railroad be suspended but allowed the company to file interim rates containing additional charges not to exceed 50% of those initially proposed. The ICC's orders also require that Penn Central maintain an account from which refunds could be made to the extent that the proposed tariffs could not be justified to the Commission. In *Port of New York Authority* v. *U.S.*, 451 F.2d 783, 785-88 (CA2, 1971), the Second Circuit held that the Order was unreviewable and that federal courts lacked subject matter jurisdiction over an action challenging the Order.

We conclude that the ICC as corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend. Therefore, this aspect of its Order is not reviewable by this court.

3. The refund provisions

As a condition precedent to the interim rates which the Commission stated it would accept, the Commission required the carriers to establish refund provisions for use in the event that either the interim rates or the originally filed tariffs [15] or both should be found to be excessive.

With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. *See Port of New York Authority* v. *U.S.*, *supra*. We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie*, where the condition upheld by the Supreme Court was permanent.[16]

4. Arbitrariness and confiscation

The petitioners assert that the Commission action was an abuse of discretion and that the interim rate ceilings are so grossly insufficient that they are confiscatory in violation of the Fifth Amendment. Restating, we understand these contentions to be that even if the Commission is authorized by § 15(7) to act with respect to the subject matter, its exercise of power departed from con-

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[15] As we noted previously, if the Commission does not complete its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect.

[16] Under § 15(7) the Commission may require carriers to keep records and make refunds after the seven-month period has expired. This expressly conferred authority is not what we rely upon—it relates to "a proposed increased rate or charge."

stitutional standards. Assuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. The thesis of the Commission is that it has the unreviewable authority to suspend the pipeline's initial rate filing and, as an adjunct of that authority, it has the power to fix an unreviewable interim rate for the seven month period. The idea that the Commission can set an unreviewable rate without following the statutory ratemaking procedures runs counter to the entire plan established by Congress in the Interstate Commerce Act.

This is ratemaking. We should not hide from that fact. The Commission candidly admits that it is making an interim rate. To suggest that the rate is "voluntary," that no rate has been set by the Commission because theoretically the pipeline companies could accept the seven month stay and not file for the interim rate, exalts form over substance in a way rarely countenanced by this Court. The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the respondents. Without a filed tariff, no oil can flow. No one has made the slightest suggestion in brief or oral argument that it would be either in the public or private interest for the transportation of this oil to be suspended for seven months while the Interstate Commerce Commission determines whether or not the proposed tariff is reasonable and just. *See* 43 U.S.C.A. § 1651 (Supp. 1977). We are given to understand that the rate here under consideration does not affect the price of oil at the delivery point, or the eventual price to the consuming public. Any transportation cost adjustment affects only the wellhead

price of oil. Although there is almost complete identity between the affiliates which own the pipeline and those who receive the wellhead price, there are some others involved, and the royalty to the State of Alaska and property owners varies with the wellhead price.

The argument that this is not ratemaking because it is only an interim and not a permanent rate loses force in numbers. The pipeline companies claim the difference between what they should get and what they will get under the interim rate could amount to $340,000,000. This sum is undoubtedly greater than the amount at stake in many permanent rates subject to ICC approval.

Although *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), and *United States* v. *Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973), are cited for the proposition that the grant or denial of a suspension order is not reviewable, they in fact only hold that a court has no authority at all to suspend a rate and that an ICC refusal to suspend is not reviewable under any statutory standard. They do not hold that a suspension order is unreviewable under constitutional due process standards. I would think that a suspension order in this case, where the lack of any tariff would effectively close down the Alaska Pipeline for seven months, and would eliminate any method of transporting the oil from the Alaska oil fields for that period of time, would be reviewable on a constitutional due process standard.

We are not confronted, however, with just a suspension order. The order before us is schizophrenic. It is both a suspension order *and* a ratemaking order.

This is a situation never previously confronted by the courts. It most situations, if a new rate is submitted to the ICC and the agency chooses to suspend it, this merely means that the carrier involved will continue to charge

the rates already in existence. Thus the ICC need not take further action to ensure that the carrier can stay in business and collect charges that at least at one time were assumed to be reasonable, during the seven month period. Here, however, the Commission was faced with a brand new entity. The Trans-Alaska Pipeline System had no preexisting rate schedule when it filed its "new" rate with the ICC. Thus, after deciding to suspend the filed rate, the ICC was faced with a situation which left no legal rate in effect for the seven month period. Unwilling to allow the pipeline to shut down, the Commission had to promulgate what is a "second" order, a ratemaking order.

Rate setting orders are clearly reviewable under the statute. Therefore I would not review the possible legality of just a suspension order here. I would accept this case for what it is: an attempt by the Commission to do two things, the first of which it would not do had it not the power to do the second. There is no indication in anything before us that the Commission would suspend the proposed tariff if it could not set an interim rate. Thus I would not reach the constitutional considerations that might demand review of a suspension order alone in this unique situation. There is no indication that the Commission would follow such a course. Its claimed authority to do so becomes merely the theoretical exercise of power onto which it hangs its ability to set an interim rate.

So I would assume without deciding that the Commission has the power to suspend the initial rate and go to the question of whether it can set the interim rate in the manner done here. If the interim rate cannot stand, I would send the case back to the Commission for whatever action it wishes to take within the confines of its legal authority. If it chooses to suspend without an interim rate, then on review a court could consider

whether that action alone under the circumstances of this case can withstand the due process requirements of the Constitution. Or, if it chooses to arrive at some interim rate through procedures that have some resemblance to the ratemaking procedures which Congress had required, that too could be reviewed. However, I do not think that in order to decide the case before us we need to make any definitive decision as to whether an initial rate suspension alone, under the facts of this case, would be legal, or whether the Commission can ever set interim rates in connection with a rate suspension. All I would now hold is that the Commission has no authority to do what it did here.

United States v. *Chesapeake & Ohio R.R.*, 426 U.S. 500 (1975), is the only controlling authority relied upon for the proposition that interim ratemaking is a necessary power under the suspension authority. In deciding that interim ratemaking is unreviewable, the majority opinion completely overlooks the fact that the Supreme Court considered the "conditions" imposed on the proposed tariff there to be reviewable.

> In this Court, Chessie has argued that . . . the application of the Commission's action to it is arbitrary and capricious. . . . Since the District Court held that the Commission did not have the power to impose conditions on the refiling of the tariff, it did not address this question. Chessie, if it chooses, may raise the matter on remand in the District Court.

426 U.S. at 515. To distinguish the point on the ground that in *Chessie*, the rate was permanent, must also distinguish the case beyond support for the proposition espoused in the case at bar.

This case is factually and legally different from *Port of New York Authority* v. *United States*, 451 F.2d 783

(2d Cir. 1971), relied upon by the majority. There the initial decision had been made to suspend the effective date of the proposed increase in tariffs. There was a tariff in effect after suspension, one which had already been determined to be reasonable either through Commission action or lack of complaint. The suspension order was concededly within the sole discretion of the Commission, and *all* that was involved was timing. The Commission offered to let the carrier collect an interim increase, if it chose to do so. For two reasons that case is not helpful here.

First, in that case, there was a good faith suspension order of the rate increase which did not cut off services. Here there is *no* indication that the Commission would suspend the tariff and consequently cause a seven month delay in service. In fact, we are told that in oral argument before the Commission, the director of the Commission's Bureau of Investigation and Enforcement indicated the owners of the pipeline might be subject to civil or criminal penalties if they did not file for these "voluntary" interim rates. Such view would dispel any thought that the public interest required a rate suspension. This is pointed out not to suggest that a suspension order would be reviewable under the statutory public interest standard, but only to emphasize that the Commission has made no such decision upon which to hang the *Port of New York Authority* holding.

Second, the pipeline companies' choice is not whether to adhere to present rates for seven months, or accept an interim increase, as was the case in *Port of New York Authority*, but whether to do business at all, or accept an interim rate. This does not make acceptance or rejection of the interim rate the viable choice that was available in that case.

The interim rate being reviewable, the next question is whether it can stand. Even if the Commission is

permitted some leeway, and allowance is made for the fact that it "pursued a more measured course and offered an alternative tailored far more precisely (than a simple suspension) to the particular circumstances presented," *Chessie*, 426 U.S. at 514, the manner of arriving at the interim rate was beyond the most liberal reading of its statutory authority.

Congress has set well-established limits on the ICC's power to make rates. First, historically, the ICC did not have ratemaking power. It could set aside a rate as being unreasonable, but the Supreme Court found no implied power to set a reasonable rate. *ICC* v. *Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U.S. 479 (1897). Only nine years later did Congress amend the Act to give the ICC power to set maximum rates, Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 689, and not until 1920 was it given power to set minimum rates, Act of Feb. 28, 1920, ch. 91, § 418, 41 Stat. 484.

Second, the ICC has the power to set rates *only after* it has determined that a proposed rate is unreasonable. That principle has been reiterated in several cases which indicate that it is the carriers who have the right to propose initial rates. *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 89 (1913) ("Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order." 227 U.S. at 92). *See also New York* v. *United States*, 331 U.S. 284 (1947); *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 522 (1923); *Southern Pacific Co.* v. *ICC*, 219 U.S. 433 (1911); *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 118-119 (1908).

Third, a proposed rate can be found unreasonable *only after* a full hearing. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262 (1932) ("The legal standards governing the action of the Commission in determining the reasonableness of the rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement.") The courts have consistently held that a finding by the ICC of unreasonableness of the rate proposed by the carrier must be supported by substantial evidence on the record as a whole. *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271 (1926); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 (1919); *Archer Daniels Midland Co.* v. *United States*, 301 F. Supp. 328 (D. Minn. 1969) (3-judge court); *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 282 F. Supp. 430, 434 (D. Kan. 1968) (3-judge court).

Last, the ICC can establish a rate only after a *full evidentiary hearing*. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262 (1932); *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 89, 93 (1913). That hearing requirement is not satisfied by the "brief and informal hearing" which accompanies a suspension order. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672 (1963). The case for strict enforcement of the hearing requirement is particularly strong because this rate applies to so few companies, and the administrative inconvenience of multiple parties which sometimes justifies lowered procedural standards is not present. *Compare Londoner* v. *Denver*, 210 U.S. 373 (1908) (individual property assessment without hearing invalid) with *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915) (city-wide revaluation does not require individual adjudication). Even in the multiparty rate cases, administrative hearings have withstood attack only when the agency granted adequate notice

and opportunity to comment both on the original rate proposal and on the comments made by others. *See Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1074-1076 (5th Cir. 1975), *cert. denied sub nom., California Co.* v. *FPC*, 426 U.S. 941 (1976).

In this case where is the finding of unreasonableness of the proposed rate on an evidentiary record, and where is the record to support the interim rate? The Commission readily admits that it cannot support either finding by record evidence.

But procedural unfairness is only the beginning of the arbitrariness in this case. The real difficulty, and the problem that makes the procedural shortcuts so detrimental to the petitioners, is that Congress through the Act has provided a reasonable way to protect *all* parties in this proceeding against the effect of error in the proposed rate, but the Commission has, without offer of justification, ignored it in the proposed interim tariff. If the rate is determined to be too high, the carriers may be forced to refund, with interest, 49 U.S.C.A. § 15(7) (Supp. 1977), or pay back as damages, with costs and attorneys' fees, 49 U.S.C.A. § 8, an overcharge collected prior to rate determination. In other words, the parties overcharged can be made whole. If the interim rate is too low, however, the ICC program provides no means whatsoever for the pipeline to recover the difference between what it was required by the Government to charge, and what that same Government later decides would have been a reasonable rate. To have a way to protect all interests, and not take it, and subject one party to the possibility of irreparable loss, is impermissible under even the most deferential standard of judicial review.

The complainants argue that a system of refunds would produce justice at the price of delay. Even justice delayed, however, is preferable to justice forever denied. At oral argument, Commission's counsel sug-

gested no harm had been done because the interim rate is the highest rate that could reasonably be established for the pipeline. That statement constitutes a gross prejudgment of what the ICC will do, and overlooks entirely the reviewable nature of the Commission's ultimate ratemaking action. Without a sufficient record to support a finding of anything at all, and with serious questions about the rate of return, the treatment of inflation, and allowances for depreciation, counsel would have this Court predict what Commissioners, who may not be in office now, will do on the evidence presented them, and what a court of judges, who may not be in office now, will do on review of whatever those Commissioners do.

Nor can this Court sustain the interim rate by obeisance to the expertise of the Commission. Only after a fully hearing upon complaint made does the law give weight or significance to the opinion of the Commission. *Atlantic Coast Line R.R.* v. *ICC*, 194 F. 449 (Commerce Ct. 1911). The expertise of the Commission can only be relied upon after it has exercised its expert judgment on the record before it. *See* Pedersen, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975).

Hence I would hold that the Commission had no authority to set in the way it did the interim rate which was forced upon the carriers. I would set aside that proposed interim rate for these reasons: *first*, the Commission did not even attempt to follow congressionally mandated procedures for setting rates; *second*, without some specific finding of unreasonableness in the proposed rate, it appears arbitrary not to follow the statutory plan by which all parties could be protected against any eventual rate determination, and to follow a course which would cause irreparable damage to the pipelines if their position is eventually sustained; *third*, the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative

risks of equity capital, a rate arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor.

I would set aside the Commission's Order of June 28, 1977 and remand the case to the Commission for further consideration consistent with its statutory authority.

APPENDIX B

[1] CLOSED SESSION

BEFORE THE
INTERSTATE COMMERCE COMMISSION

COMMISSION CONFERENCE

CLOSED SESSION

TRANS ALASKA PIPELINE SYSTEM

Interstate Commerce Commission
Room 4223
12th & Constitution Avenue, N. W.
Washington, D. C.

9:10 p.m.
Tuesday, June 28, 1977

Commissioners:

A. Daniel O'Neal, Chairman
Charles L. Clapp, Vice Chairman
Rupert L. Murphy
Dale W. Hardin
Betty Jo Christian
George M. Stafford
Robert C. Gresham
Alfred T. MacFarland
Virginia Mae Brown

Staff:

Mark Evans, General Counsel
Charles H. White, Jr., General Counsel's Office
Janice M. Rosenak, Office of Proceedings
William T. Bono, Cost and Valuation

Ronald S. Young, Accounting
Thomas L. Gire, Section of Rates
Douglas P. Baldwin, Commissioner's Office
Gloria E. Blazsik, Commissioner's Office
Richard B. Felder, Commissioner's Office
Alan Heifetz, Commissioner's Office
Richard D. Heironimus, Commissioner's Office
Dan G. King, Commissioner's Office
Louis Mackall, Commissioner's Office
Chester A. Nauminow, Commissioner's Office
John H. O'Brien, Commissioner's Office
Kathleen D. Ribaudo, Commissioner's Office

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[52] AFTERNOON SESSION

(1:00 p.m.)

Commissioner O'Neal: What I thought we would do, once this is circulated, is just run through the various issues addressed in the—why don't we go through the order, issue by issue, and then if you, Jan, would read the parts that are changed, we will briefly discuss each item.

Ms. Rosenak: Okay.

Commissioner O'Neal: Now, the first part is the question of whether we have the power to suspend initial rates, right?

Ms. Rosenak: Uh-huh.

Commissioner O'Neal: I didn't have any problem with that discussion, I don't know if somebody else did. Then we get into whether the rates should be suspended, given —well, it was whether it should be suspended, right?

Now, what—there are some changes on this page, too, and let's see what it is.

Ms. Rosenak: Yes, the changes on page 1 are merely to substitute "authorized" for "specified" and to indicate that the suspension, or the interim rates are for the suspension period only.

On page 2—

Commissioner O'Neal: In other words, do you understand why she's—that she's put in the word "authorize" for "specify" because using the word—well, where it says —let's [53] get it here—

Ms. Rosenak: Yes. We felt that was more consistent with a lack of prescription.

Commissioner O'Neal: Well, let's find an example.

Ms. Rosenak: All right. An example would be the last paragraph on page 1, under Number 3, "whether interim rate can and should be", instead of "specified", we used "authorized". It's the same thing in the next sentence.

Commissioner O'Neal: The reason being that we don't want any mistake made about whether there is prescription of rates or not.

Ms. Rosenak: Right. Then, on page 2, the first paragraph, we've deleted the word "chief"—the end of the first paragraph, the second line from the bottom—it will read now, "However, the question raised by the protest is whether there is reason to believe the proposed rates are not just and reasonable". It's a question of emphasis.

Commissioner O'Neal: Anything else on page 2?

Ms. Rosenak: That's the only change on 2.

Commissioner O'Neal: The next issue which, I guess, really comes up here on page 3 is whether the Commission can name specific maximum reasonable rates and whether that's a prescription of rates, and that's dealt with here on page—starting on page 3, right?

Ms. Rosenak: Uh-huh.

[54] Commissioner O'Neal: Any other—

Ms. Rosenak: Changes on—

Commissioner O'Neal: Were there any changes on 3?

Ms. Rosenak: No, the changes on 3 are minor; again, "authorization", up above. It was suggested that this be worded "could act as a deterrent or an obstacle" and there's a typographical error in the—

Commissioner O'Neal: Where is that?

Ms. Rosenak: The middle of the second last paragraph, second paragraph from the bottom.

Commissioner O'Neal: "Moreover, it is noted by Protestants the maintenance of excessive high rates"—

Ms. Rosenak: Yes, "could act as a deterrent or an obstacle".

Commissioner O'Neal: You put in "or an obstacle"?

Ms. Rosenak: Yes, deterrent. And two lines above that is showing "of probable cause", which is a typographical error.

The changes on sheet 4—

Commissioner O'Neal: On this sheet, we get into the discussion of what is a—the level of the interim rates.

Ms. Rosenak: Most of the changes were editorial until near the bottom where there is a Number 1, the third line from the bottom.

The language we previously had was "to view the available [55] data in a light that is favorable to the carriers". In the substitute sheet 4 that we have just circulated, that language has been deleted and, instead, it will read "to accept the basic data"—

Commissioner O'Neal: Supplied by the carriers.

Ms. Rosenak: —"supplied by the carriers".

Commissioner O'Neal: There is a "to" there, it should be "to accept the basic data".

Ms. Rosenak: This is basically what the Protestants did, as well as the Commission, was at the suspension level, use the figures supplied by the carriers, with minor exceptions.

Commissioner O'Neal: Almost, I think, everybody yesterday was saying, "We accept the data for now", realizing that it's subject to further investigation by the Commission, and realizing that we don't have the information now to make any changes.

Commissioner Hardin: Jan, back on page 2 we changed "specified" to "authorized" somewhere. Where was that?

Ms. Rosenak: Yes. Page 2—

Commissioner Hardin: Or on page 1, I guess.

Ms. Rosenak: Yes.

Commissioner O'Neal: Page 1, at the bottom there.

Ms. Rosenak: On page 1 in two places.

Commissioner Hardin: Should be "authorized". The reason I raised the question is that on page 4 we, again, talk about [56] "specify".

Ms. Rosenak: We've left it in in one or two places but, in most instances, we've taken out "specify".

Commissioner Hardin: I don't know, I just wondered whether you—whether it was intentional or whether it was an oversight in leaving it in there.

On the changed page 4, you're still talking about specifying?

Commissioner Murphy: Well, I think it's the way—if I may interject—the one on sheet 1 read "whether interim rates can be and should be specified". Now, over on sheet 2—I mean 4—in paragraph 11 of "interim rates"—

Ms. Rosenak: That will be removed. That is an error. "To be specified" will come out.

Commissioner O'Neal: Where is that, now?

Ms. Rosenak: That's on page 4; we missed that. I don't mind if it's in the text but it shouldn't be in that heading. So that will just read "the level of interim rates", period.

Commissioner Brown: That's the way it does read on mine.

Ms. Rosenak: Oh, then I did catch it. All right.

Mr. Evans: You're thinking of the heading on page 3, Jan.

Ms. Rosenak: Okay. There was one that we had missed and I thought that was it.

Commissioner O'Neal: So, the change did get made?

Ms. Rosenak: Yes, that's correct.

[57] Commissioner O'Neal: Except that we do have something in the text here on—

Commissioner Hardin: Yes, that first sentence after that heading, it says "whether we have the discretion to specify an interim rate".

Ms. Rosenak: All right. It will only take us a second to change that.

Commissioner O'Neal: Yes, I wonder—that ought to be added in.

Commissioner Gresham: How are you going to word it, Jan?

Ms. Rosenak: "Authorize an interim rate".

Commissioner O'Neal: So that third line under "level of interim rates" on page 4 would read "We have the discretion to authorize an interim rate", rather than "specify an interim rate".

Ms. Rosenak: Yes.

Commissioner Hardin: And in the sixth line from the top you have "the rates that would be specified would not be intended to have a permanent effect". "Rates that would be authorized would not be intended to have a permanent effect"?

Commissioner O'Neal: Well, if it doesn't cost us anything, why don't we take it out of there?

Commissioner Christian: How about "these interim rates would not be intended"?

Ms. Rosenak: Yes, "these interim rates".

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[75] Commissioner Brown: I don't understand the refund.

Commissioner O'Neal: How the refund provision works, the 15 (8) (e)?

Commissioner Brown: Well, you're talking about in regard to both?

Commissioner O'Neal: Yes. In other words, Commissioner Murphy—

Commissioner Brown: You're putting in the interim —what would you refund?

Commissioner O'Neal: Well, it may be higher.

Ms. Rosenak: If their rate base is overstated, even the interim rates could be too high following the hearing.

Commissioner O'Neal: In other words, we're going with, say, a $5.10 rate for EXXON. After we've gone through the investigation, we might find that that rate should be $4.50 and so a refund would apply.

Commissioner Clapp: We've tried to err, I think, on the generous side in the interim rates.

Commissioner Gresham: Jan, couldn't you take care of that problem by simply saying, "However, subject to the condition that any tariffs filed or authorized contain a refund provision"?

The last paragraph, "subject, however, to the condition that any tariffs filed or authorized contain a refund [76] provision", wouldn't that take care of the original ones as well?

It only takes about three words.

Commissioner Stafford: Do we have the authority to do it, to force a refund, Mark?

Commissioner O'Neal: There might be some question that, whether that applies to previously filed.

Ms. Rosenak: Would you consider doing this later?

Commissioner Gresham: Yes, sure.

Ms. Rosenak: Mr. Chairman, I think that we could easily put out a separate order between now and the seven-month period.

Commissioner O'Neal: But do we lose the leverage here if we do that?

Commissioner Hardin: Yes, we do.

Commissioner O'Neal: Right now we can make it a condition.

(Simultaneous discussion.)

Mr. Evans: Commissioner Stafford just asked a question that might be worth raising, whether the Commission

does have the authority to impose a refund provision with respect to the initially filed tariffs.

What I responded was I thought that the statute was somewhat doubtful on the face of it insofar as you're talking about—if there was no suspension, it would be doubtful.

[77] But insofar as the refund provision is made a condition of the willingness of the Commission to accept a lower filed rate in the interim, that may get us over that hurdle.

Ms. Rosenak: Yes, I believe that would bet us over that hurdle.

Commissioner Stafford: Once their rate they've filed for, which we're preparing to knock down, but at the end of seven months, we assume, then, their rate would go into effect, the one that they have filed for, can they say we don't agree to the refund provision?

Ms. Rosenak: Well, by putting it in this order, it's sort of quid pro quo for allowing them to have these interim rates. So if it is included in this order, I think that we're okay.

Mr. Evans: They would have a choice, I think, then, of either—if they didn't agree, either not refiling—

Ms. Rosenak: Yes, that's right.

Mr. Evans: Or if they refiled, they would also have to file amendments to the initial tariffs or what would it be? How would you characterize the refund provision insofar as it applies to the original tariffs?

Commissioner Hardin: Proposed rates.

Ms. Rosenak: Yes, yes.

Mr. Evans: But would it be a supplement to the tariffs that would add the refund provision?

[78] Ms. Rosenak: Yes, they would have to publish a refund provision. The other thing we could do is require them to keep a count, but then it wouldn't be self-implementing, and we did this to get over the question

that was raised about these affiliated companies, would one really refund it to the other.

Commissioner Stafford: And this doesn't get us any closer to the Moss case?

Ms. Rosenak: No, I don't think the refunds do. The problem with the refund provision is our statutory authority is somewhat questionable. This works really under the 4-R Act, but the old theory was that you had refunds after seven months.

The other thing is the statute refers to refunds in the case of increased rates. Here you have initial rates, but if we do it as part of allowing interim rates instead of a suspension, I think we're within reasonable limits.

Commissioner Murphy: If you put increased rates, they'll let it go back up to the ones we've put in here on that—

Ms. Rosenak: That's right.

Commissioner Murphy: You've got increased rates right there.

Ms. Rosenak: Yes, I think we are all right on this. At least we have to take the chance. I think refunds are essential.

[79] Commissioner Christian: I'd feel more comfortable if it was in this order.

Ms. Rosenak: Yes.

Commissioner O'Neal: We have got to have something in the order.

Mr. Evans: I wonder if I can suggest a possible way to handle it neatly and, I think, cleanly. Why not say, "subject however, to the following conditions; one, that the interim tariffs contain a refund provision" just like you've got.

And when you're through with that, have a semicolon, and "two, that the carriers file supplements to their original tariffs containing a similar refund provision", or something to that effect.

That way it's quite clear we're talking about two separate provisions—

Commissioner O'Neal: Yes.

Mr. Evans: And hopefully clear.

Commissioner O'Neal: That would seem like a nice, clean way to do this. General Counsels are handy to have around.

Mr. Evans: That's the nicest thing anybody has said to me since I've been here. (Laughter.)

Commissioner Clapp: And probably the nicest thing that will be said to you by the time you go. (Laughter.)

Commissioner Murphy: That all has to be subject to the 24-hour notice, the order.

APPENDIX C

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V. No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Interstate Commerce Act

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

Commission empowered to determined and prescribe rates, classifications, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or

practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed. 49 U.S.C. § 15 (1) (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 15, 24 Stat. 384, *as amended by* Act of June 29, 1906, Ch. 3591, § 4, 34 Stat. 589; Act of June 18, 1910, Ch. 309, § 12, 36 Stat. 551; Act of Feb. 28, 1920, Ch. 91, § 418, 41 Stat. 484; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 10(a), 54 Stat. 911).

* * * *

Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such

schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter.

49 U.S.C. § 15(7) (1976) (originally enacted as Mann-Elkins Act of 1910, Ch. 309, § 12, 36 Stat. 551, *amending* Act of Feb. 4, 1887, Ch. 104, pt. I, § 15, 24 Stat. 384, *and as amended by* Act of Feb. 28, 1920, Ch. 91, § 418, 41 Stat. 484; Act of Mar. 4, 1927, Ch. 510, § 2, 44 Stat. 1447; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 10(c), 54 Stat. 912; Act of Feb. 5, 1976, Pub. L. No. 94-210, Tit. II, § 202(e)(1), 90 Stat. 36).

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Supreme Court, U. S.
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No. 77-602

In the Supreme Court of the United States

OCTOBER TERM, 1977

ARCO PIPE LINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL PARTIES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This case, which involves the propriety of an order of the Interstate Commerce Commission suspending petitioner's initial rate tariffs for the carriage of crude oil over the Trans Alaska Pipeline System, arises out of the same set of facts and raises the same legal issues as three other cases already pending before the Court on petitions for a writ of certiorari—*Mobil Alaska Pipeline Company* v. *United States,* No. 77-452; *Exxon Pipeline Company* v. *United*

States, No. 77-457; and *BP Pipelines Inc.* v. *United States*, No. 77-551. For the reasons stated in our brief in opposition to those petitions,[1] this petition for a writ of certiorari also should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

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[1]We are furnishing petitioner's counsel with a copy of our brief in opposition in those cases.

DOJ-1977-11